EXHIBIT C

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RE: Center for Biological Diversity, et. al. v. California Department of Conservation et al. (Alameda SC Case No. RG15769302)

Dear Tamara:

We respond to your letter dated March 31, 2016, "Plaintiffs' Comments on DOGGR's Draft Administrative Record Index." DOGGR appreciates your willingness to work cooperatively to informally resolve any disputes over the contents of the administrative record in this case.

At the outset, we note that plaintiffs' position regarding the proper scope of the record as to the second cause of action is unclear. Plaintiffs have repeatedly said—in CMC statements and in court—that the second cause of action challenges DOGGR's compliance with ministerial, mandatory duties, and therefore a lengthy record is not required to adjudicate those claims. Plaintiffs asked the Court to adopt a compressed litigation schedule accordingly. Yet, your March 31 letter appears to ask that the record include "the complete files for each Class II UIC well" and "all maps relevant to all of the Class II UIC wells authorized to operate, or currently operating, into a non-exempt aquifer or one of the eleven aquifers 'historically treated as exempt.'" (March 31 Letter at pp. 2-3.) Such a record might include some 6,000 well files and many related project files and would be very different from what plaintiffs have said would be required.

The record DOGGR is preparing as to the second cause of action will be limited to what the Court determined was the justiciable theory articulated in the petition. The Court found that plaintiffs alleged that DOGGR "has issued permits into non-exempt aquifers, and through the issuance of emergency regulations, intends to continue doing so through 2017." (Oct. 5, 2015 Order at p. 2.) Citing DOGGR's Memorandum of Agreement with the federal EPA, the Court determined that plaintiffs "may be able to demonstrate that the issuance of one or more permits

[for injection into non-exempt aquifers] was arbitrary and capricious, and that reasonable minds could differ on how DOGGR should exercise its discretion in those instances." (*Ibid.*)[1] The record will therefore contain documents relevant to DOGGR's approval of new underground injection wells into non-exempt aquifers from December 22, 2014 to November 5, 2015. December 22, 2014 is the date the EPA sent DOGGR a letter establishing the permissible parameters for such approvals. November 5, 2015 is the date DOGGR began assembling the portion of the record pertaining to such approvals. As reflected in the draft index, the record will include relevant well files, project files, maps and cross-sections, and background materials related to DOGGR's decisions to allow injections in the limited circumstances the EPA established as the Aquifer Exemption Compliance Schedule Regulations' deadlines go into effect.

DOGGR is not preparing a record reflecting its UIC program generally or any past or present UIC aquifer exemptions. As plaintiffs are aware, the Court warned that "a challenge to the effectiveness with which DOGGR administers the UIC Program" or "a challenge to prosecutorial discretion" would run afoul of the separation of powers. (Oct. 5, 2015 Order at p. 2.) Thus, the documents contained in plaintiffs' December 2015 submittal—to the extent they are not already in the record—will not be included, with one exception discussed below. In addition, as we wrote on December 23, 2015, many of the documents in the "initial submittal" were obtained from agencies other than DOGGR. Plaintiffs argued just this week in support of a motion for a protective order, "the Court's ultimate task [is] determining whether the agency's decision is supported by the body of evidence *the agency itself assembled and actually considered* to make its decision." (P's Reply ISO Protective Order at p. 1 [emphasis added].) We agree; extra-record evidence cannot be included.

Moreover, the preparation of a complete and accurate record reflecting the State's UIC program generally—which is what the March 31 letter appears to contemplate—would likely require delaying the trial for many months. Plaintiffs have repeatedly said they want to avoid delay, and DOGGR has therefore been working expeditiously to prepare a record that properly reflects plaintiffs' statements about the record and the Court's prior ruling on the second cause of action.

Your contention that all "documents attached to or included in the Center's comment letter, including hyperlinks within the comment letter, must be included in this action's record" is legally incorrect. The rulemaking file DOGGR submitted to the Office of Administrative Law included petitioners' comment letter and the documents attached to it, but not documents petitioners cited. (Gov. Code, § 11347.3.) By law, the only evidence upon which the first cause of action may be tried is the rulemaking file and DOGGR's finding of emergency. (Gov. Code, § 11350.) The 1993 "Benzene in Water" report was not included in the rulemaking file, therefore it cannot be included in the record and used as evidence to challenge the regulations'

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[1] DOGGR disputes that any duty under its Memorandum of Agreement with EPA can be enforced against it as a matter of law. It also disputes that the Court has jurisdiction to invalidate any DOGGR permits.

legality under the Administrative Procedure Act.[2] Nevertheless, in the spirit of compromise, DOGGR will include that report in the record as to the second cause of action while preserving its right to object to any citation to it in support of plaintiffs' first cause of action.

Finally, a number of assertions in your March 31 letter are incorrect. You state that DOGGR admitted that "the number of wells operating into non-exempt aquifers or aquifers with uncertain exemption status" "exceeded 2,500 in number," and also admitted that "thousands of additional wells are operating without permits into non-exempt aquifers." As we explained at the July 2, 2015 hearing on plaintiff's preliminary injunction motion, the 2,500 figure was the number of wells identified as *potentially* injecting into a non-exempt aquifer based on DOGGR's inclusive search parameters, but some number of wells on that list were inactive or were not actually injecting into non-exempt aquifer zones. Developments since then have borne that statement out. As we also said at that hearing, to DOGGR's knowledge all Class II injection wells have been approved by DOGGR, and the drilling of an injection well without DOGGR's approval would incur significant civil and criminal liability for the driller. As this case moves toward trial, we ask that plaintiffs refrain from misrepresenting DOGGR's statements and positions, particularly as "admissions."

We're willing to discuss your letter and any questions about the record further, but remind you that there are logistical constraints imposed by the April 22, 2016 deadline for circulating the certified record.

Sincerely,

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Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

Cc (by email): Jeffrey Dintzer
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[2] In arguing the 1993 report should be included, plaintiffs appear to conflate administrative law principles applicable to mandamus actions with those applicable to the Administrative Procedure Act.